

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JANINE L. HURLBURT**

Claimant

VS.

**T-MOBILE USA, INC.**

Respondent

AND

**TRAVELERS PROPERTY CASUALTY COMPANY  
OF AMERICA**

Insurance Carrier

Docket No. 1,021,535

**ORDER**

Claimant appealed the September 25, 2008, Order entered by Administrative Law Judge Thomas Klein. The Board placed this appeal on its summary docket for disposition without oral argument.

**APPEARANCES**

W. Walter Craig of Derby, Kansas, appeared for claimant. William L. Townsley, III, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

**RECORD AND STIPULATIONS**

The record in this request for penalties is the administrative file compiled by the Division of Workers Compensation (Division).<sup>1</sup>

**ISSUES**

In short, claimant injured both upper extremities working for respondent. Upon an appeal to this Board, claimant was awarded permanent disability benefits under K.S.A. 44-510e. But respondent appealed the Board's Order to the Kansas Court of Appeals,

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<sup>1</sup> Claimant indicates in her brief to the Board that a penalties hearing was held before Judge Klein on September 9, 2008, but no record was made.

which reversed and remanded the claim to the Board to recalculate claimant's permanent disability benefits as injuries under the schedule of K.S.A. 44-510d. Claimant then requested review of the Court of Appeals' decision by the Kansas Supreme Court.

The present appeal involves claimant's request for penalties for the respondent's failure to pay permanent disability benefits. Claimant filed her application for penalties after the Kansas Court of Appeals reversed and remanded this claim to the Board but before the Kansas Supreme Court ruled upon claimant's request for review. In the September 25, 2008, Order, Judge Klein denied claimant's request for penalties for the following reasons:

[T]he Court finds that K.S.A. 44-556 does not apply to this situation as the Respondent paid benefits through the pendency of the Court of Appeals decision, but discontinued benefits while awaiting a final Award for the Board on remand. Additionally, the Court does not believe that it currently has any jurisdiction over this case, as it has been remanded to the Board for a recalculation. This Court is fully aware that the entire matter may well be remanded to this Court in the future for a decision, but believes that whichever entity first decides the matter, it should decide all issues together for the sake of efficiency.<sup>2</sup>

Claimant contends Judge Klein erred. Claimant argues respondent was required to pay permanent partial disability benefits while this claim remained before the Kansas Supreme Court on her request for review. Consequently, claimant requests the Board to assess penalties against respondent in the sum of \$100 per week from July 17, 2008, until claimant's permanent partial disability benefits "are brought current and up to date pending the remand and new award or in the alternative until the final ruling by the State of Kansas Supreme Court."<sup>3</sup> Claimant's argument is summarized, as follows:

Claimant filed an application for Civil Penalties Pursuant to K.S.A. 44-512a and a hearing was held before Judge Thomas Klein on September 9, 2008. There was no record taken. The claimant relied on K.S.A. 44-556, which required the respondent to continue benefits during the pendency of the appeal and until there was a decision by the Court of Appeals on review.

The claimant still relies on the same statute specifically 44-556(b). The Court of Appeals remanded this case back to the Board of Appeals with directions to issue an Award pursuant to Casco. This has [n]ever been done. The Court of Appeals did not grant respondent or respondent counsel the ability to calculate a new award nor did the Court of Appeals grant respondent or respondent counsel with an order allowing them to stop paying the previously ordered PPD benefits.

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<sup>2</sup> ALJ Order (Sept. 25, 2008) at 2.

<sup>3</sup> Claimant's Letter at 2 (filed Oct. 13, 2008).

A strict and literal reading of the statute and the Court of Appeal[s'] decision remanding this case to recalculate the award does not mean that this case has reached a final award. As previously stated, this case is on appeal to the State of Kansas Supreme Court. This case was remanded back to The Workers Compensation Board of Appeals. It was not, no[r] has it been decided on a final award.<sup>4</sup>

Conversely, respondent argues the September 25, 2008, Order should be affirmed. First, respondent argues claimant's application for penalties was defective in four different ways, to wit: (1) claimant's August 4, 2008, purported demand letter does not set forth with particularity the unpaid compensation being requested as required by K.S.A. 44-512a; (2) the August 4, 2008, letter was not served in the manner required by K.S.A. 44-512a as it was only sent to respondent's attorney and not to the employer or its insurance carrier; (3) the letter did not comply with K.S.A. 44-512a as the letter was not sent by registered mail; and (4) the application for penalties filed by claimant did not seek penalties for failure to pay permanent partial disability benefits but, instead, sought penalties for failure to pay attorney fees.

Finally, respondent argues claimant's request for penalties should be denied on the merits as respondent's obligation to pay permanent disability benefits ceased when the Court of Appeals determined claimant should receive permanent disability benefits for scheduled injuries under K.S.A. 44-510d.

The issue before the Board on this appeal is whether the Judge erred by denying claimant's request for penalties.

#### **FINDINGS OF FACT**

After reviewing the record, the Board finds:

This case was first decided in a June 20, 2006, Award and a June 26, 2006, Award Nunc Pro Tunc. Special Administrative Law Judge Marvin Appling determined claimant was entitled to receive permanent disability benefits under K.S.A. 44-510e for bilateral upper extremity injuries based upon a 12 percent whole person functional impairment.

By its Order dated November 21, 2006, this Board increased claimant's award to one for a 37 percent work disability<sup>5</sup> as calculated under K.S.A. 44-510e. Respondent appealed that Order to the Kansas Court of Appeals, which reversed and remanded the

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<sup>4</sup> *Id.* at 1, 2.

<sup>5</sup> A permanent partial disability that is greater than the functional impairment rating.

claim to the Board to recalculate claimant's permanent disability benefits as injuries under the schedule of K.S.A. 44-510d. The Kansas Court of Appeals, which released its decision on July 18, 2008, held:

Hurlburt's workers compensation benefits for the partial loss of the use of both of her arms [should] be calculated under the scheduled injury statute, K.S.A. 44-510d, which provides the exclusive benefits for her injuries. Therefore, because Hurlburt suffered scheduled injuries, the Board's award based upon K.S.A. 44-510e is reversed and the case is remanded to the Board for calculation of Hurlburt's benefits as scheduled injuries under K.S.A. 44-510d.<sup>6</sup>

But that Court of Appeals decision did not immediately become final because claimant requested review by the Kansas Supreme Court.<sup>7</sup> Therefore, the Board was without jurisdiction to address the Court of Appeals' order for remand while the claim was pending before the Kansas Supreme Court. The Kansas Court of Appeals' decision became final on November 4, 2008, when the Kansas Supreme Court declined review.<sup>8</sup>

On August 4, 2008, claimant's counsel sent respondent's counsel a letter advising that no permanent disability checks were received after July 16, 2008. A copy of the letter is in the Division's file and reads:

Please be advised that we have not received permanent partial disability checks since July 16, 2008.

Please be advised that despite the opinion issued by the Kansas Court of Appeals, this case has not been set for the remand and decision.

We will file and schedule a motion for Penalties pursuant to K.S.A. 44-512a.

Should you have any questions or concerns, please do not hesitate to reach me at my office.

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<sup>6</sup> *Hurlburt v. T-Mobile USA, Inc.*, No. 97,779, 2008 WL 2796458 (Kansas Court of Appeals unpublished opinion filed July 18, 2008, *rev. denied* Nov. 4, 2008).

<sup>7</sup> Kansas Supreme Court Rule 8.03 states that the timely filing of a petition for review shall stay the issuance of the mandate of the Court of Appeals. Pending determination by the Kansas Supreme Court on the petition for review (and during the time in which to file the petition) the opinion of the Court of Appeals is not binding. And if review is refused, the decision of the Court of Appeals becomes final as of the date of the Kansas Supreme Court's refusal.

<sup>8</sup> The Board will address the Court of Appeals' order for remand in a separate order after giving the parties an opportunity to submit their briefs.

There is no indication on the letter itself or in the Division's file that the letter was sent by either certified or registered mail. Moreover, there is no indication the letter was sent to either the respondent or its insurance carrier.

On August 26, 2008, claimant filed with the Division an application for penalties. But that application requested penalties for refusing to pay attorney fees. The application reads, in part:

The claimant respectfully requests and *[sic]* as *[sic]* Order from the Court assessing civil penalties against the respondent pursuant to K.S.A. 44-512a for the refusal to pay his post award attorney fees.

### CONCLUSIONS OF LAW

The Workers Compensation Act provides that benefits awarded by the Board are to continue while a claim is on appeal to the Court of Appeals. The Act reads, in part:

(b) Commencement of an action for review by the court of appeals shall not stay the payment of compensation due for the ten-week period next preceding the board's decision and for the period of time after the board's decision and prior to the decision of the court of appeals on review.<sup>9</sup>

The Act also entitles workers to penalties when compensation that has been awarded is not paid when due. The Act provides:

(a) In the event any compensation, including medical compensation, which has been awarded under the workers compensation act, is not paid when due to the person . . . entitled thereto, the employee shall be entitled to a civil penalty, to be set by the administrative law judge and assessed against the employer or insurance carrier liable for such compensation in an amount of not more than \$100 per week for each week any disability compensation is past due . . . if: (1) Service of written demand for payment, setting forth with particularity the items of disability . . . compensation claimed to be unpaid and past due, has been made personally or by registered mail on the employer or insurance carrier liable for such compensation and its attorney of record; and (2) payment of such demand is thereafter refused or is not made within 20 days from the date of service of such demand.<sup>10</sup>

Respondent challenges claimant's right to receive penalties on the basis that claimant did not comply with the above-quoted statute. The Board agrees. As indicated

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<sup>9</sup> K.S.A. 2007 Supp. 44-556.

<sup>10</sup> K.S.A. 44-512a.

above, the parties did not make a record of the penalties hearing presented to Judge Klein. Therefore, the only record on appeal is that which is contained in the Division's records. And those records fail to establish that claimant's demand letter was mailed or served on both the employer or insurance carrier and the attorney of record by registered or certified mail. In addition, claimant's August 4, 2008, letter to respondent's attorney did not specify with particularity the disability compensation claimant was seeking. And finally, the application for penalties that claimant filed with the Division requested penalties for the failure to pay attorney fees. The Board finds claimant failed to comply with K.S.A. 44-512a. Therefore, claimant's request for penalties for the failure to pay disability compensation for the entire period before the decision of the Kansas Court of Appeals must be denied.

In short, claimant's request for penalties was procedurally defective and, therefore, the request for penalties is denied.

**WHEREFORE**, the Board affirms the September 25, 2008, Order entered by Judge Klein but for reasons other than those expressed by the Judge.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November, 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: W. Walter Craig, Attorney for Claimant  
William L. Townsley, III, Attorney for Respondent and its Insurance Carrier  
Thomas Klein, Administrative Law Judge